No. 14592

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant and Cross-Appellee,

vs.

ADOLPH G. SUTRO,

Appellee and Cross-Appellant.

BRIEF OF APPELLANT AND CROSS-APPELLEE.

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No. 14588

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant and Cross-Appellee,

vs.

ADOLPH G. SUTRO,

Appellee and Cross-Appellant.

BRIEF OF APPELLANT AND CROSS-APPELLEE.

Jurisdictional Statement.

This is an appeal from a judgment of the District Court for the Southern District of California, Central Division, entered on July 29, 1954. That judgment awarded money damages to the appellee in an action brought by him against the United States of America arising out of negligent conduct on the part of employees of the United States of America acting within the scope of their employment, which conduct was alleged to have injured the appellee [R. 4, 9-11]. Jurisdiction to entertain that action was conferred upon the District Court by 28 U. S. C., Sec. 1346(b) (which section is a part of that Act commonly known as the Federal Tort Claims Act). Jurisdiction to entertain this appeal is conferred upon this Court by 28 U. S. C., Sec. 1291.

Statement of the Case.

In 1946 appellee purchased certain farm lands in the San Luis Rey District of San Diego County. These lands are riparian to a stream known as Pilgrim Creek. Sometime before 1946, in order to serve the needs of its military installation at Camp Pendleton, California, appellant constructed at this installation a sewage disposal plant. From the date of its construction until 1952 effluents from that plant were deposited in Pilgrim Creek. The water flowing in the Creek during this period thereby became so polluted that it was not fit for the irrigation of land used to grow certain edible vegetables which were grown elsewhere in the area. Before the water in the Creek became polluted, it had been used by prior owners of appellee's land for all irrigation purposes, and in an unpolluted condition could have been so used by the appellant during the period 1946 through 1952.

The District Court has found that appellant's employees were negligent in the way in which they operated the sewage disposal plant and that due to such negligence the waters of Pilgrim Creek were polluted to the appellee's injury. Appellant concedes the correctness of this finding and concedes the correctness of the District Court's conclusion that appellant is liable in damages to appellee under the Federal Tort Claims Act. Appellant now challenges only the District Court's award of damages.

The District Court awarded to appellee the sum of $18,918.36 representing appellee's loss of rental value be-

cause of the polluted condition of Pilgrim Creek [R. 45]. In addition, the District Court awarded him $13,003.03 as "increased building costs" [R. 46]. The theory upon which this second item of the award was made is as follows: When appellee purchased the land in 1946 he intended to build upon it in that year certain improvements so that he could conduct thereon an intensive farming operation; because of the polluted condition of Pilgrim Creek these improvements would be of no use to him since he could not conduct such an operation without using unpolluted water from the Creek; thus he had to wait until the condition of pollution ceased in 1952 before construction of the improvements could begin; in the interim building costs had increased and the appellant having negligently caused the delay should be made to respond in damages for such increased costs [R. 386-387].

Appellant concedes the correctness of the District Court's award with respect to the loss of rental but challenges the entire amount of the award relating to increased building costs. In challenging this portion of the award, appellant does not dispute that building costs had in fact increased in an amount represented by the award for the improvements in question during the period 1946 through 1952, but disputes the propriety of recovery for such an item in a tort action.

Question Presented.

Whether as a matter of law a party aggrieved through the commission of a tort may recover damages for an item such as increased building costs where the only evidence that such increased costs would in fact be incurred is evidence that the aggrieved party intended to build at a time of lower costs, and where the only relation between the tort-feasor and the increased building costs is the circumstance that the tort-feasor created a condition due to which the aggrieved party chose not to build, though had he chosen otherwise he could have done so at the lower cost, notwithstanding that the condition created by the tort-feasor existed.

Specification of Error.

The District Court erred in awarding the appellee damages for "increased building costs" in a case sounding in tort.

Summary of Argument.

The District Court erred in awarding to the appellee an amount representing "increased building costs." In an action in tort an aggrieved party may recover only for such damages as were "proximately" caused by the tort-feasor. There may never be a recovery for damages which are remote and speculative. The increased building costs involved in this case were not "proximately" caused by the defendant's tort and such costs are too remote and speculative to be a proper item of damage under the facts of this case.

Argument.

This is an action under the Federal Tort Claims Act for a tort which occurred in California; hence the law of California should control its outcome. (28 U. S. C., Sec. 1346(b).)

> *Filice v. United States,* 217 F. 2d 515 (C. A. 9, 1954);
>
> *Rushford v. United States,* 204 F. 2d 831 (C. A. 2, 1953).

The California rule respecting damages for which a recovery may be had in a tort action is declared by the following provision of the California Civil Code:

> For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. California Civil Code, Sec. 3333.

This section of the California Civil Code has been held by the Supreme Court of the State of California to be declaratory of the general law of tort damages.

> *Wells v. Lloyd, et al.,* 6 Cal. 2d 70, 56 P. 2d 517 (1936).

See also:

> 14 Cal. Jur. 2d, Damages, §70 *et seq.*

California courts recognize that speculative and remote damages may not be recovered.

> *Taylor v. Hopper,* 207 Cal. 102, 276 Pac. 990 (1929);
>
> *Ramsey v. Penry,* 53 Cal. App. 2d 773, 128 P. 2d 399 (1942).

It has however, been recognized in California that:

> "There is no fixed inflexible rule for determining the measure of damages for injury to or destruction of property; whatever formula is most appropriate to compensate the injured party for the loss will be adopted."
>
> *Basin Oil Co. v. Baash-Ross Tool Co.,* 125 Cal. App. 2d 578, 271 P. 2d 122 (1954).

It is appellant's position in this appeal that the formula adopted by the District Court is incorrect insofar as it makes possible an award for "increased building costs." This position is based upon two lines of reasoning. The first is that appellant did not "proximately cause" the increased building costs within the meaning of Section 3333 of the California Civil Code, and the second is that a recovery may not be had for this item because it is too remote and speculative.

California courts have held that in order for a tortfeasor to be held the "proximate cause" of a particular injury and thus responsible for it in damages, it is necessary that the injury be the "natural and direct consequence of the tort," *Wells v. Lloyd, supra,* or that the injury be such as to "naturally flow" from the tortious act, *Bartlett v. Federal Outfitting Co.,* 133 Cal. App. 747, 24 P. 2d 877 (1933), or have some "causal connection" with

the tortious act, *John Breuner Co. v. Western Union Telegraph Co.,* 108 Cal. App. 243, 291 Pac. 445 (1930). Appellant submits that these phrases state the law on this subject as accurately, perhaps, as it may be stated. However, appellant submits that standing alone these phrases are of little or no value. It is necessary to examine the item claimed in the light of the circumstances surrounding it before a proper determination may be made.

One such circumstance present here is the fact that at will, appellee could have constructed any buildings upon this land without interference from appellant. He chose not to do so while the Creek was polluted. His reason for not doing so was in all probability an economic one. However, appellant did nothing to or upon this land which would have prevented him from building. For this reason appellant urges that it was not the legal or proximate cause of this injury, if such it be. It would instead seem that the true cause lay instead in the mind of the appellee himself.

Appellant's examination into the California law of damages for the tortious injury to real property interests, and into the law of other states upon the subject indicates that a so-called normal or general rule has arisen with respect to the problem. That rule is that the tort-feasor should be made to reimburse the injured landowner for the loss of land value in the case of a permanent injury and for loss of use, *i. e.,* rental value, in the case of a temporary injury.

> *United States v. Fixico,* 115 F. 2d 389 (C. A. 10, 1940);
>
> *Revis v. Chapman & Co.,* 130 Cal. App. 109, 19 P. 2d 511 (1933);

Maddox v. Yocum, 114 Ind. App. 390, 52 N. E. 2d 636 (1944);

Ryder v. Town of Lexington, 303 Mass. 281, 21 N. E. 2d 282 (1939).

The injury here was temporary. The District Court's award respecting rental value does compensate appellee for his loss of use [R. 45]. Appellant can find no specific authority for that portion of the award now in dispute. It is submitted that this item is too far removed from appellant's tort and too far beyond the scope of the normal rule of damages for injuries to real property to be a recoverable item of damage here.

An additional circumstance which appellant now asks this Court to consider is the fact that appellee purchased this land after the pollution had commenced and after the growing of certain edible vegetables with water from Pilgrim Creek had been prohibited [R. 148]. While there is nothing in the record now before this Court to show that appellee had actual knowledge of the condition of the Creek or of the prohibition of the time of his purchase, it is inconceivable that a man of appellee's business experience and acumen would not know of these facts at the time he purchased the land [R. 126-135]. If the Court agrees with this conclusion, we urge that the following argument be considered. Namely, that appellee should not be allowed the item in dispute because he knew before he owned the land that many problems, perhaps, even litigation, faced him before it would be economically advantageous for him to build. Appellant does not make this argument with respect to rental value because it feels that irrespective of knowledge of these facts appellee was the landowner, and as such, entitled to the full value of the land. However, we submit that as to increased building

costs appellee's knowledge of these conditions is significant and should operate as a bar to recovery of this item.

Appellant's research into the subject of tort damages leads it to the conclusion that the underlying principle behind all tort recovery is that unless damages are made punitive by statute, they should be awarded to make the injured party as "whole" as possible.

> *Milwaukee & St. Paul R. Ry. Co. v. Arms,* 91 U. S. 489 (1875);
>
> *In re Schuyler, Chadwick & Burnham, et al.,* 63 F. 2d 241 (C. A. 2d, 1933);
>
> 25 C. J. S., Damages, Secs. 3, 17.

It seems to appellant that appellee has been made as "whole" as possible by the award of damages for rental value. To give to appellee damages for increased building costs seems to do more. It seems to give him something which he did not have before and something for which appellant does not believe the law makes it responsible.

Conclusion.

That item of damages awarded by the District Court as "increased building costs" is not under the facts and circumstances of this case, as a matter of law properly recoverable.

Respectfully submitted,

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